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In the Supreme Court of the United States

OCTOBER TERM, 1979

UNITED STATES RAILROAD RETIREMENT BOARD,
APPELLANT

v.

GERHARD H. FRITZ

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA

JURISDICTIONAL STATEMENT

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OPINION BELOW

The findings of fact and conclusions of law of the district court (App. A, *infra*, 1a-32a) are not reported.

JURISDICTION

The judgment of the district court (App. B, *infra*, 33a-35a) was entered on July 27, 1979. A notice of appeal (App. C, *infra*, 36a-37a) was filed on August 22, 1979. On October 12, 1979, Mr. Justice Stevens extended the time for docketing the appeal to and

including November 20, 1979, and on November 14, 1979, Mr. Justice Stevens further extended the time for docketing the appeal to and including December 5, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1252. *Weinberger* v. *Salfi*, 422 U.S. 749, 763 n.8 (1975); *McLucas* v. *DeChamplain*, 421 U.S. 21, 31-32 (1975).

QUESTION PRESENTED

Whether Section 3(h) of the Railroad Retirement Act of 1974, 45 U.S.C. 231b(h), violates the Due Process Clause of the Fifth Amendment because it distinguishes between classes of annuitants, with respect to the amount of benefits they receive, based on their length of service and current affiliation with the railroad industry.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the Constitution provides in pertinent part:

> No person shall * * * be deprived of life, liberty, or property, without due process of law * * *.

2. Section 3(h) of the Railroad Retirement Act of 1974, 45 U.S.C. 231b(h), is set out in Appendix D, *infra*, 38a-43a.

STATEMENT

1. The Railroad Retirement Act of 1974, 45 U.S.C. 231 *et seq.* ("the 1974 Act"), provides retirement and related benefits to individuals who have been em-

ployed for at least 10 years in the railroad industry. 45 U.S.C. 231a(a)(1). Railroad retirement benefits are distinct from, but interwoven with, benefits received under the Social Security Act, 42 U.S.C. 401 *et seq.*[1] Some explication of this relationship and of the manner in which railroad retirement benefits are calculated is necessary to expose the clear error of the district court's decision.

a. In 1951, Congress provided for a system of financial interchange between the two programs, under which the Railroad Retirement Account was, in effect, reinsured by the Social Security Account.[2] Under this arrangement, which is still in effect, funds are transferred each year from the Railroad Retirement Account to the Social Security Account in an amount equal to the social security taxes that would have been paid by the railroads and their employees if railroad service were covered by the Social Security Act. In return, funds are transferred from the Social Security Account to the Railroad Retirement Account each year in an amount equal to the benefits that would have been paid under the Social Security Act to retired railroad employees, their de-

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[1] Railroad employees are not covered by the Social Security Act. See 42 U.S.C. 410(a)(9).

[2] See generally S. Rep. No. 93-1163, 93d Cong., 2d Sess. 2-3 (1974); H.R. Rep. No. 93-1345, 93d Cong., 2d Sess. 2-3 (1974); *The Railroad Retirement System: Its Coming Crisis, Report of the Commission on Railroad Retirement*, H.R. Doc. No. 92-350, 92d Cong., 2d Sess. 3-21, 51-75, 167-180 (1972) (hereinafter *Report of the Commission on Railroad Retirement*).

pendents, and survivors if the employees' railroad service were covered by the Social Security Act. See *Hisquierdo* v. *Hisquierdo*, 439 U.S. 572, 575 (1979). As explained below, however, these payments from the Social Security Account are reduced in certain instances.

Prior to 1975, an individual who had been employed outside the railroad industry for a sufficient period to qualify for benefits under the Social Security Act could receive social security benefits in addition to the railroad retirement benefits to which he was entitled by virtue of his 10 years or more of railroad service. However, in order to prevent the payment of multiple benefits from the Social Security Account, the annual payment from that Account to the Railroad Retirement Account on behalf of an individual receiving dual benefits was reduced by the total of the benefits that that individual received directly from the Social Security Account for his nonrailroad work. And because the Social Security Act grants proportionately greater benefits than does the Railroad Retirement Act to persons with relatively short periods of service and low wages, the reduction in the payment from the Social Security Account to the Railroad Retirement Account on behalf of an individual receiving benefits under both programs was disproportionately large. The excess cost of dual benefits was, accordingly, borne entirely by the Railroad Retirement Account. See H.R. Rep. No. 93-1345, 93d Cong., 2d Sess. 2-3 (1974). S. Rep. No. 93-1163, 93d Cong., 2d Sess. 2-3 (1974).

As a result of this statutory scheme, employees who received dual benefits caused a considerable net drain on the Railroad Retirement Account. This drain was one of several factors, including reduced railroad employment and rising benefits, that led Congress to voice concern about the financial soundness of the railroad retirement system. See S. Rep. No. 93-1163, *supra*, at 2-3; H.R. Rep. No. 93-1345, *supra*, at 2-3. *Report of the Commission on Railroad Retirement* 3-21, 51-75, 107-130, 361-366 (note 2, *supra*).

b. Against this background, Congress in 1970 created the Commission on Railroad Retirement to study the actuarial soundness of the railroad retirement system. Pub. L. No. 91-377, Section 7, 84 Stat. 792-794. See *Hisquierdo* v. *Hisquierdo*, *supra*, 439 U.S. at 574 n.3. The Commission's final report, which was submitted to Congress on June 30, 1972, recommended that the basic railroad retirement annuity be divided into two components, one to correspond to the level of social security benefits non-railroad workers receive and the other representing an additional component for railroad service. *Report of the Commission on Railroad Retirement* 22-23, 502-503. The Commission also recommended that the "windfall" accruing to persons receiving railroad retirement and social security benefits should be eliminated in the future, both because of the financial drain dual benefits created on the Railroad Retirement Account and because of what the Commission perceived to be the unfairness resulting when employees who split their careers be-

tween railroad and non-railroad work received greater retirement benefits than employees who spent their entire careers in the railroad industry. *Id.* at 344-345, 349-357, 366-367. However, the Commission also recommended the inclusion of special transitional or "grandfather" provisions to protect, in varying degree, the expectations of employees or retired employees who were already receiving, would soon be eligible to receive, or anticipated future receipt of benefits under both the social security and railroad retirement programs. *Id.* at 367-369.

Following receipt of the Commission's proposals, Congress requested representatives of railroad employees, retirees, and carriers to submit a report containing their recommendations for measures to ensure the solvency of the railroad retirement system, based upon their negotiations and taking into account the specific recommendations of the Commission. Pub. L. No. 92-460, Section 6, 86 Stat. 767. That report was submitted to Congress on February 27, 1973. It called attention to the complexities of the problem and indicated that substantial progress had been made in arriving at mutually agreeable solutions. See H.R. Rep. No. 93-1345, *supra*, at 28; S. Rep. No. 93-1163, *supra*, at 27. Congress then requested representatives of management and labor to develop and submit recommendations in the form of a draft bill. Pub. L. No. 93-69, Section 107, 87 Stat. 165. The bill eventually introduced and (with some modifications not directly relevant to the question pre-

sented in this case) enacted as the Railroad Retirement Act of 1974 was based on the recommendations of the Joint Labor-Management Negotiating Committee. H.R. Rep. No. 93-1345, *supra*, at 28; S. Rep. No. 93-1163, *supra*, at 27.[3]

c. The Railroad Retirement Act of 1974 followed the suggestion of the Commission on Railroad Retirement that the retirement annuity be divided into components, one corresponding to social security benefits and the other a supplemental benefit attributable to railroad service. In this respect, as the Court noted in *Hisquierdo* v. *Hisquierdo*, *supra*, 439 U.S. at 574, the Act resembles both a private pension program and a social welfare plan. The upper, and smaller, tier of an annuity under the Act is tied to the employee's earnings and career service in the railroad industry alone. 45 U.S.C. 231b(b); 45 U.S.C. 231a(b). The lower, and larger, tier corresponds to the total benefits that the employee would receive if his railroad retirement service were covered by the Social Security Act. 45 U.S.C. 231b(a).

The "social security component" is computed on the basis of the employee's combined railroad and nonrailroad service. 45 U.S.C. 231b(a). However, if the employee is also eligible to receive benefits under

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[3] The process by which the bill was introduced following industry negotiations was not novel. The Railroad Retirement Act of 1937 was also the product of extensive negotiations between management and labor following presidential intervention. See *Hisquierdo* v. *Hisquierdo*, *supra*, 439 U.S. at 574 n.3. *Report of the Commission on Railroad Retirement* 58.

Title II of the Social Security Act because he was employed outside the railroad industry for a sufficient period of time to be permanently insured under that Act, the "social security component" of his railroad retirement annuity is reduced by the amount he is paid directly from the Social Security Account for his non-railroad service. 45 U.S.C. 231b(m).

The offset provision in 45 U.S.C. 231b(m), under which an annuity is reduced by the amount of actual social security benefits received, effectively eliminates the accrual and receipt of dual benefits under the two programs in the future, as the Commission on Railroad Retirement had recommended. But Congress did include in the 1974 Act transitional protection for employees who were already receiving dual benefits or, in certain situations, had an expectation of doing so at the time the new legislation was adopted. This protection, which is embodied in the form of yet a third component or tier of benefits (commonly called the "windfall component" because of its favorable ratio of benefits received to taxes paid) is available in some situations in which the annuity has been reduced pursuant to the offset provision in 45 U.S.C. 231b(m).

In order to qualify for any "windfall component," the retired employee must have completed 10 years of railroad service and have been permanently insured under the Social Security Act on one of two dates. If the retired employee performed some creditable railroad service in calendar year 1974, had a "current connection with the railroad industry" as

of December 31, 1974 (or such later date as he retired),[4] or had completed 25 years of railroad service as of December 31, 1974, he would be entitled to a "windfall" benefit if he had completed 10 years of railroad service and was permanently insured under the Social Security Act as of December 31, 1974. 45 U.S.C. 231b(h)(1). However, if the retired employee left the railroad industry before 1974 without having completed 25 years of service and did not retain a "current connection" with the industry at the close of 1974, he would be entitled to a "windfall" benefit, lesser in amount, only if he had completed 10 years of railroad service and was permanently insured under the Social Security Act on the date he left the railroad industry.[5] 45 U.S.C. 231b(h)(2). Thus, a

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[4] The term "current connection with the railroad industry" is defined in 45 U.S.C. 231(o) to mean employment in the industry in 12 of the preceding 30 calendar months. Thus, an employee who left the railroad industry well before 1974 but who was reemployed in the industry after 1974 in 12 of the 30 months prior to his retirement is eligible to receive a "windfall" benefit if he was "vested" under both programs as of December 31, 1974.

[5] The amount of the "windfall" component is greater under subsection (h)(1) than under subsection (h)(2). The former component consists of a social security level benefit based on social security service through December 31, 1974, plus a social security level benefit based on railroad service through December 31, 1974, minus a social security level benefit based on combined social security and railroad service through December 31, 1974. The formula used under subsection (h)(2) is similar, except that only social security service through the date the individual left the railroad industry, rather than through December 31, 1974, is used in computing the amount of the benefit. This difference in the

retired employee who left the railroad industry for other employment before 1974 and was not permanently insured under the Social Security Act when he did so could not receive *any* "windfall" benefit, even if he subsequently performed sufficient non-railroad service to become permanently insured under the Social Security Act by December 31, 1974.

2. On July 26, 1976, L. Jackson Lipp and William D. Gibson filed a class action in the United States District Court for the Southern District of Indiana, seeking a declaratory judgment that 45 U.S.C. 231b (h) irrationally distinguishes between classes of annuitants based solely on whether the annuitant had a current connection with the railroad industry and is therefore unconstitutional under the Due Process Clause of the Fifth Amendment. The government moved to dismiss on October 8, 1976, arguing, *inter alia*, that because the named plaintiffs were not yet eligible to retire, they did not have standing to raise the constitutional issue. An amended complaint was filed on December 8, 1976, with appellee Gerhard Fritz, a retired railroad worker who had left the industry in 1956 and was not receiving any "wind-

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date through which social security service is counted corresponds, of course, to the difference in the date by which the retired employee must have been permanently insured under the Social Security Act in order to be eligible for any "windfall" benefit under the two subsections.

fall" benefit, as an additional named plaintiff.[6] The district court eventually certified a class, represented

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[6] The original complaint, filed on July 26, 1976, sought declaratory relief and an order requiring that the plaintiff class's annuity be computed on the same basis as the annuity of those who had worked in the industry in 1974 or had a current connection with the industry. The amended complaint, filed on December 8, 1976, sought essentially similar relief. However, the district court, by order dated October 16, 1978, determined that the amended complaint should not relate back to July 26, 1976, for purposes of the three-judge court provision in 28 U.S.C. 2282. That provision was repealed on August 12, 1976, except as to actions commenced on or before that date. Pub. L. No. 94-381, Section 7, 90 Stat. 1120. The district court therefore declined to seek the convening of a three-judge court.

This Court has jurisdiction of this appeal under 28 U.S.C. 1252, even if the district court erred in failing to convene a three-judge court. *McLucas* v. *DeChamplain*, 421 U.S. 21, 31-32 (1975); see also *Weinberger* v. *Salfi*, 422 U.S. 749, 763 n.8 (1975). If the Court were to conclude that a three-judge court should have been convened, the proper course would be to vacate the judgment below and remand with directions to convene a three-judge court. *McLucas* v. *DeChamplain, supra*, 421 U.S. at 32 n.12.

However, we agree with the district court's determination that a three-judge court was not required in this case. The principal purpose of Rule 15(c), Fed. R. Civ. P., which provides for the relation back of a complaint in some circumstances, is to ensure that a cause of action is not barred by the statute of limitations where a defendant had adequate notice and is not otherwise prejudiced. Advisory Committee's Note to Proposed Amendment to Rule 15, Fed. R. Civ. P., 39 F.R.D. 73, 82-84 (1966). No statute of limitations question is presented here. Relation back is relevant to this case only with respect to application of the three-judge court provi-

by appellee Fritz, of all persons eligible to retire between January 1, 1975, and January 31, 1977, who were not eligible to receive any "windfall" benefit (App. A, *infra*, 2a).

3. On cross motions for summary judgment, the district court held that 45 U.S.C. 231b(h) creates an irrational and unconstitutional distinction between classes of annuitants. It therefore ordered that members of appellee's class be paid the full "windfall" benefit payable under 45 U.S.C. 231b(h)(1). See App. B, *infra*, 33a-34a.[7]

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sion, which is to be strictly construed. *Mitchell* v. *Donovan*, 398 427, 431 (1970).

Moreover, the only named plaintiffs in the original complaint were not yet eligible to receive retirement benefits. They are therefore not members of the class eventually certified by the district court and are not parties to the present appeal. Appellee Fritz, who was determined by the district court to be a proper representative of the certified class and who is a party to the present appeal, was named only in the amended complaint—presumably in response to the government's motion to dismiss the original complaint on the grounds that the named parties did not have standing to bring the action because they were not yet eligible to receive retirement benefits. Under these circumstances, the district court did not err in declining to order that the amended complaint relate back to the date of the original complaint for purposes of the three-judge court provision.

[7] The district court's certification of a class of former railroad employees who had retired by January 31, 1977, avoided the issue, raised by the government in its motion to dismiss the first complaint, that persons who had not yet retired and were therefore not yet eligible to receive railroad retirement benefits suffered no actual injury entitling them to bring the present suit. The district court nevertheless concluded

The district court acknowledged that the distinction drawn by Congress with respect to the total amount of benefits a retired employee could receive does not constitute deprivation of a fundamental right or impose a burden based upon suspect criteria and that the discrimination against appellee's class must therefore be "arbitrary, capricious and irrational before such discrimination can be held unconstitutional" (App. A, *infra*, 28a). The court stated, however, that the rationality of the classification must be judged against the purposes sought to be accomplished by the legislation. Finding that the

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that its holding that 45 U.S.C. 231b(h) unconstitutionally distinguishes between annuitants would apply equally to railroad employees who retired after January 31, 1977 (App. A, *infra*, 31a-32a). The court, in its judgment, therefore ordered plaintiffs to initiate proceedings to compel the Railroad Retirement Board to prepare a plan (if the Board did not prepare such a plan on its own initiative) for the payment of benefits to the members of this "general class" of all employees who retired after January 31, 1977, in the same manner as the court had ordered benefits payable to the members of the certified class (App. B, *infra*, 34a-35a).

Because the certified class was defined to include former railroad employees who were receiving no "windfall" benefits, the judgment of the district court does not by its terms hold unconstitutional the distinction in 45 U.S.C. 231b(h)(1) and (2) with respect to the amount of "windfall" benefits that may be received by retired employees who are entitled to receive some such benefits. However, the reasoning of the district court, discussed below, would appear to require the conclusion that retired employees receiving the lesser benefit under subsection (h)(2) are likewise entitled to receive the full benefit payable under subsection (h)(1). It is apparent, then, that the decision of the district court will have implications well beyond the effects on the certified class.

purposes of the 1974 Act "were to place the Railroad Retirement Fund on a sound actuarial basis and to protect completely the rights of those persons entitled before December 31, 1974, to receive their full benefits under both Social Security and Railroad Retirement earned and 'vested' under the previous law" (*ibid.*), the court concluded (*id.* at 30a) that the discrimination against appellee was not rationally related to the congressional purpose.

The district court relied primarily on the recommendations of the Commission on Railroad Retirement in support of its conclusion that the 1974 Act had the purpose to "protect completely" the dual benefits of railroad employees. The court conceded (App. A, *infra*, 14a-15a, 18a-19a, 30a) that the Joint Labor-Management Negotiating Committee had departed from this aspect of the Commission's proposal by recommending that Congress treat retirees in appellee's position in the manner mandated by the plain language of 45 U.S.C. 231b(h). But the court found (App. A, *infra*, 30a) that this departure was motivated by a desire on the part of the labor negotiators on the Joint Committee to increase future benefits for persons still in the railroad industry at the expense of those, such as appellee, who had left. In the court's view (*ibid.*), this breach of what it characterized as the "railroad labor union's duty of fair representation" owed to appellee heightened the arbitrariness, capriciousness and irrationality of the distinction drawn in 45 U.S.C. 231b(h).

Finally, the court was influenced by what it found to be the Joint Committee's inadequate explanation of its recommendation to Congress, the failure of the Joint Committee and the Railroad Retirement Board to notify representatives of appellee's class of the proposed changes, and the failure of the responsible committees of Congress to invite representatives of appellee's class to testify regarding the legislation (App. A, *infra*, 13a, 15a, 17a-19a). In sum, the court found that Congress did not understand the law it enacted, in part because of what it considered to be the Joint Committee's obfuscation, and that this factor bore "adversely on the rationality of a statutory discrimination between similarly situated persons" (*id.* at 30a).

THE QUESTION IS SUBSTANTIAL

The district court has held that an Act of Congress is unconstitutional. This decision is in error, because Congress had a rational basis for distinguishing between annuitants, based on their years of service or current affiliation with the railroad industry, in the award of "windfall" Railroad Retirement Act benefits. The question presented involves substantial sums of money and affects large numbers of persons.[8] Review by this Court is therefore appropriate.

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[8] The Railroad Retirement Board estimates that the invalidation of the distinction drawn in Section 3(h) of the Railroad Retirement Act of 1974, 45 U.S.C. 231b(h), would result in the annual payment of an additional $119 million in "windfall" benefits for each of the next 20 years.

1. As the district court recognized (App. A, *infra*, 31a), railroad retirement benefits, like social security benefits, are not contractual in nature and may be altered or even eliminated by Congress at any time. *Hisquierdo* v. *Hisquierdo*, *supra*, 439 U.S. at 575. See also *Flemming* v. *Nestor*, 363 U.S. 603, 610-611 (1960). Accordingly, Congress could have eliminated dual benefits under the Social Security and Railroad Retirement Acts by failing to include any "windfall component" in the 1974 Act for all employees, including those who had already begun to receive dual benefits under prior law. However, Congress took the far less drastic step of eliminating dual benefits in the future only with respect to railroad employees who were not permanently insured under the Social Security Act and did not have 10 years of railroad service as of December 31, 1974, or upon such earlier date as they may have left the railroad industry. For those who did meet either of these threshold requirements, Congress further distinguished among annuitants on the basis of the relative strength or duration of their ties to the railroad industry in 1974 or on the date of their subsequent retirement. The Due Process Clause does not preclude Congress from choosing this reasonable middle ground when it would have been free to eliminate dual or "windfall" benefits altogether.

2. The distinctions drawn in the Railroad Retirement Act of 1974 on the basis of an employee's ties to the railroad industry do not burden fundamental rights or create classifications that rest upon suspect

criteria. *Vance* v. *Bradley*, 440 U.S. 93, 96-97 (1979); *San Antonio Independent School Dist.* v. *Rodriguez*, 411 U.S. 1, 40 (1973). Hence, the statutory classification in 45 U.S.C. 231b(h) is unconstitutional only if "the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that [the Court] can only conclude that the legislature's actions were irrational." *Vance* v. *Bradley*, *supra*, 440 U.S. at 97. See also *Califano* v. *Jobst*, 434 U.S. 47, 53 (1977); *Califano* v. *Goldfarb*, 430 U.S. 199, 210 (1977); *Weinberger* v. *Salfi*, 422 U.S. 749, 768 (1975). As the Court stated in *Flemming* v. *Nestor*, *supra*, 363 U.S. at 611:

> Particularly when we deal with a withholding of a noncontractual benefit under a social welfare program such as [Social Security], we must recognize that the Due Process Clause can be thought to interpose a bar only if the statute manifests a patently arbitrary classification, utterly lacking in rational justification.

Here, Congress could rationally have concluded that those who had 25 years of service in the railroad industry, had worked in the industry in 1974, or had a current connection with the industry at the end of that year or at the time of their subsequent retirement had somewhat stronger equities in retaining the "windfall" of dual benefits afforded by the Railroad Retirement Act than did people who had left the in-

dustry and no longer had such ties.[9] Indeed, this is precisely the basis on which the Joint Labor-Management Negotiating Committee recommended the formulation in the present 45 U.S.C. 231b(h) to Congress in 1974. See *Restructuring of the Railroad Retirement System: Hearings on H.R. 15301 Before the House Comm. on Interstate and Foreign Commerce*, 93d Cong., 2d Sess. 168 (1974). Once it is conceded, as it must be, that Congress may appropriately draw a line somewhere in establishing threshold qualifications for retirement benefits,[10] Congress' choice here, conditioning eligibility for an additional annuity component on the character and duration of an

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[9] The "current connection" test has also been utilized since 1966 in determining a retiree's eligibility for a special supplemental annuity available only to persons with 25 years of service in the industry. See 45 U.S.C. 231a(b)(1)(iv). This was intended as a reward for career service in the industry. See *Railroad Retirement Act—Supplemental Benefits: Hearing on H.R. 17285 Before a Subcomm. of the House Comm. on Interstate and Foreign Commerce*, 89th Cong., 2d Sess. 16, 36 (1966). The "windfall" benefit involved in this case may likewise be viewed as a reward for career service.

[10] Thus, a person can receive no benefits under the Railroad Retirement Act unless he has at least 10 years of service in the industry, 45 U.S.C. 231a(a), and he is not entitled to any "windfall" benefit unless he had accrued those 10 years of service by at least December 31, 1974, 45 U.S.C. 231b(h).

Congress established the 10-year eligibility requirement for the receipt of any railroad retirement benefits in 1951. Ch. 234, Section 2, 65 Stat. 683. Prior to that time, persons with less than 10 years of railroad service had been eligible to receive a railroad retirement annuity. Thus, contrary to the district court's findings of fact (App. A, *infra*, 6a), 45 U.S.C. 231b(h) does not represent Congress' first restriction on receipt of railroad retirement benefits already "earned."

employee's ties to the industry, is not unconstitutional merely because appellee or a court would have drawn the line elsewhere. *Mathews* v. *Diaz*, 426 U.S. 67, 82-84 (1976).[11]

3. None of the reasons offered by the district court supports its contrary finding that Congress lacked a rational basis for enacting 45 U.S.C. 231b(h).

a. The court concluded, first, that the purpose of the 1974 Act was to "protect completely" the expectations on the part of *all* persons who had 10 years of railroad service and were fully insured under the Social Security Act as of December 31, 1974, that they would receive full dual benefits upon retirement (App. A, *infra*, 28a). In the court's view (*id.* at 30a), the distinction in Section 231b(h) that resulted in elimination of "windfall" benefits for the members of appellee's class was not reasonably related to this purpose. The court erred, however, in its characterization of the purposes underlying the 1974 Act. Although the Commission on Railroad Retirement did initially recommend that the benefits of persons in appellee's position not be reduced, Congress was not

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[11] In particular circumstances, the bright line drawn by Congress may produce what appear to be somewhat inequitable results. For example, an individual with 24 years' service in the railroad industry who took another job in 1972 would receive a smaller windfall annunity than an individual with 10 years' railroad service who left the industry in 1965 but came back to work one day in 1974. It is no objection to a statutory classification, however, that "such rules [may] produce seemingly arbitrary consequences in some individual cases." *Califano* v. *Jobst*, *supra*, 434 U.S. at 53. Congress was entitled to legislate with the generality of cases in mind.

obliged to accept this recommendation, and it in fact declined to do so.

As note above (see pages 6-7, *supra*), following submission of the Commission's report, Congress solicited the views of labor and management in the railroad industry. The Joint Labor-Management Negotiating Committee suggested a refinement of the Commission's recommendation, under which individuals who left the industry prior to 1974 and had no current connection to it would receive either a lower "windfall component" than those who remained in the industry or no "windfall component" at all. Representatives of the Joint Committee expressly addressed this aspect of their recommendation in their presentation to Congress and explained that this refinement "reflect[s] more accurately the comparative equities of the two groups." *Hearings on H.R. 15301*, *supra*, at 168-169. Moreover, the reports of the House and Senate Committees that considered the legislation each discussed this varying manner of treatment of those who were entitled to dual benefits under prior law (see H.R. Rep. No. 93-1345, *supra*, at 12, 38-40; S. Rep. No. 93-1163, *supra*, at 12, 38-39), including the requirement that the employee be "fully insured under the Social Security Act on December 31, 1974, or, in certain cases, as of the end of the year prior to 1974 in which the employee last engaged in railroad service," in order to be eligible for any "windfall component." H.R. Rep. No. 93-1345, *supra*, at 38; S. Rep. No. 93-1163, *supra*, at 38.

Thus, the legislative history conclusively refutes the district court's critical assumption that the intent of Congress in enacting the Railroad Retirement Act of 1974 was to "protect completely" appellee's right to continued dual benefits. By the same token, the plain language of Section 231b(h), in addition to the committee hearings and reports, disprove the court's finding (App. A, *infra*, 30a) that Congress was "unaware" of what it enacted, even assuming that a court may look behind the language of a statute to determine whether individual legislators may have misunderstood the distinctions they have created and that such an exercise would have any bearing on the constitutionality of the distinctions. See *Vance* v. *Bradley*, *supra*, 440 U.S. at 111; *Barrett* v. *United States*, 423 U.S. 212, 217 (1976) ("Congress knew the significance and meaning of the language it employed.").

b. The district court also erred in attaching significance to the manner in which the Joint Labor-Management Negotiating Committee developed its recommendations. Contrary to the district court's apparent understanding (App. A, *infra*, 10a, 12a-13a), the Joint Committee was not directed to adhere to the recommendations of the Commission on Railroad Retirement; it was required merely to take them into account. See Pub. L. No. 93-69, Section 107(c)(1), 87 Stat. 165. But in any event, the issue here is the constitutionality of an Act of Congress, not the Joint Committee's fidelity to its mission. Even if the failure of the labor representatives on

the Joint Committee to insist on absolutely equal benefits for persons such as appellee was considered to be a violation of the unions' duty of fair representation in a collective bargaining context (but see *Ford Motor Co.* v. *Huffman*, 345 U.S. 330, 338-343 (1953)), that defect would have no bearing on the constitutionality of the provisions Congress enacted.[12]

c. Finally, the district court concluded that the savings provided to the Railroad Retirement Account did not justify reducing appellee's benefits, particularly because employees such as appellee had contributed to their entitlement in accordance with the law as it existed prior to December 31, 1974, and because other methods were available to Congress to correct whatever fiscal problems existed in the railroad retirement system. However, it is beside the point that appellee may have met the threshold eligibility requirement for dual benefits upon retirement under prior law, because, as noted above, Congress

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[12] The district court also found that representatives of appellee's class were not notified of the changes recommended by the Joint Committee, were not notified by the Railroad Retirement Board prior to passage of the 1974 Act that their benefits might be reduced, and were not asked to testify before the responsible congressional committees (App. A, *infra*, 13a, 15a). These findings likewise are irrelevant to the constitutionality of the statute. We note, however, that if the district court is correct in its assertion that the distinctions drawn in Section 231b(h) are merely the result of legislative oversight, appellee and the class he represents can secure complete relief by requesting Congress to remedy the unintentional discrimination. Cf. *Vance* v. *Bradley*, *supra*, 440 U.S. at 97 & n.12.

can modify or repeal the benefit provisions at any time. *Hisquierdo* v. *Hisquierdo*, *supra*, 439 U.S. at 575.

Moreover, the district court's assumption that Congress must have diminished appellee's "windfall" benefits solely to provide savings to the Railroad Retirement Account is in error. Congress presumably shared the view of the Joint Committee that individuals who left the industry had a diminished equitable claim to "windfall" benefits, and it could have determined to reduce appellee's benefits for that reason alone, without regard to the savings produced. Indeed, it is significant that the "windfall" benefits payable under 45 U.S.C. 231b(h) are to be paid out of appropriated funds through the year 2000, rather than out of the special employment taxes paid by railroad carriers and employees. See 45 U.S.C. 231n(d).

But even if the district court's factual premise that Congress acted solely to save money or relieve the Railroad Retirement Account of an additional financial burden were correct, the determination to do so certainly does not render the legislative action unconstitutional. The decision to save what the Railroad Retirement Board has estimated to be some $2.38 billion over the next 20 years (see note 8, *supra*) by decreasing or eliminating future "windfall" benefits to those employees whom Congress believed to have a reduced claim to such benefits was within the range of available options. Congress may well have had other means to ease the stress on the Railroad

Retirement Account, but the choice of which way to proceed in allocating social welfare benefits is a legislative, not a judicial, judgment.

CONCLUSION

Probable jurisdiction should be noted. The Court may wish to consider summary reversal.

Respectfully submitted.

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DECEMBER 1979

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

Cause No. IP 76-419-C

GERHARD H. FRITZ, On Behalf of Himself and All Others Similarly Situated, PLAINTIFF

v.

UNITED STATES RAILROAD RETIREMENT BOARD (An Agency of the United States of America), DEFENDANT

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause having come on for hearing before this Court on the parties' cross-motions for summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure, and the Court having considered the evidence submitted by the parties and having considered the parties' briefs and arguments now finds there is no genuine issue as to any material fact and that the facts and conclusions of law thereon are as follows:

I. FINDINGS OF FACT

A. *The Parties.*

1. The class representative plaintiff, Gerhard H. Fritz ("Fritz"), is a former railroad employee with

17 years service. Fritz has been fully retired since October 1, 1976, and therefore is presently entitled to receive both Railroad Retirement and Social Security benefits.

2. Fritz is the duly certified class representative plaintiff in this cause of action of a class of persons who have all the following attributes:

> (a) Its members did not have a current connection with the railroad industry as of December 31, 1974, nor did such members work for the railroad industry in calendar year 1974;
>
> (b) Its members had less than 25 years but more than 10 years of credited railroad service as of December 31, 1974;
>
> (c) Its members were not receiving Railroad Retirement benefits as of December 31, 1974;
>
> (d) Its members filed applications for Railroad Retirement annuities after December 31, 1974;
>
> (e) Its members were entitled to the receipt of such annuities beginning on or before January 31, 1977;
>
> (f) Its members have been determined to be entitled to Railroad Retirement annuities and Social Security benefits but not to a so-called "windfall" amount as computed under Section 3(h) of the Railroad Retirement Act of 1974, 45 U.S.C. § 231b(h).

3. The defendant, the United States Railroad Retirement Board, is an agency of the United States and is responsible for the administration of the Railroad Retirement Act of 1974, 45 U.S.C.A. § 231 *et seq.*

B. *The History of Railroad Retirement.*

4. The railroad industry was one of the first in the United States to initiate pension programs for its employees. The private pension plans established by the railroads, however, had a number of deficiencies to which railroad labor unions objected.

5. To remedy the deficiencies of such programs, the railroad labor unions attempted to organize their own plans. These attempts, however, did not meet with success.

6. The railroad unions then sought Congressional support for the enactment of a pension plan with a federal overseer.

7. The railroad union's efforts resulted in the Railroad Retirement Act of 1934. This Act was a forerunner of the present Railroad Retirement system.

8. The Railroad Retirement Act of 1934 created the defendant federal agency, the United States Railroad Retirement Board.

9. The railroad companies contested the constitutionality of the Railroad Retirement Act of 1934 and succeeded in obtaining a ruling from the United States Supreme Court that the Railroad Retirement Act of 1934 was unconstitutional.

10. Following the Supreme Court's ruling on the Railroad Retirement Act of 1934, Congress enacted the Railroad Retirement Act of 1935. The railroad companies again, however, initiated a constitutional challenge to that act.

11. Before the challenge to the Railroad Retirement Act of 1935 could be heard by the Supreme

Court, the railroad companies and the railroad labor unions reached an agreement on the creation of a federally sponsored pension plan for industry members. This agreement resulted in the Railroad Retirement Act of 1937.

12. The Railroad Retirement Act of 1937 was the basic federal railroad retirement law as amended from time to time until the enactment of the Railroad Retirement Act of 1974.

13. Under the Railroad Retirement Act of 1937, employment in the railroad industry at a time before the enactment of the aforementioned railroad retirement acts was counted for purposes of entitlement to railroad retirement benefits. In addition, the Railroad Retirement Act of 1937 required no offset for the receipt of earned Social Security benefits.

14. The next major change in the Railroad Retirement system relevant to this controversy occurred in 1951. At that time Congress by appropriate legislation initiated a "Financial Interchange" between Social Security and Railroad Retirement.

15. Under the Financial Interchange, the Railroad Retirement Board pays to Social Security each year an amount equal to the taxes which would have been paid by all railroad employees, and by the railroads, if railroad service were service covered under the Social Security Act. Social Security, on the other hand, transfers to the Railroad Retirement system each year an amount equal to the total of Social Security benefits which would have been paid to all retired railroad employees, their dependents, and sur-

vivors if all railroad service of the employees since 1936 had been service covered under the Social Security Act.

16. The Financial Interchange has resulted in a net flow of monies from Social Security to Railroad Retirement. Indeed, the purpose of the interchange was to insure that the Social Security system would neither gain nor lose from the existence of a separate Railroad Retirement system, and to fund higher railroad benefits.

17. Also in 1951, Congress enacted into law a restriction on the concurrent receipt by a railroad pensioner of Railroad Retirement and Social Security benefits (hereinafter referred to as "earned dual benefits"). Pub. L. No. 82-234 (1951).

18. Congress thus created an offset for concurrent Social Security and Railroad Retirement benefits to the extent that such benefits were the result of credit given by both Railroad Retirement and Social Security for pre-Social Security and pre-1937 Railroad Retirement service, and, of course, before the railroad employee could have made any Railroad Retirement or Social Security contributions.

19. Under the 1951 amendment to the basic 1937 Act, if a railroad employee had no Social Security service, no offset would be applied.

20. By this restriction, Congress for the first time ever, eliminated a portion of a Railroad Retirement benefit which had been previously granted. As the historical evidence shows, a great hue and cry among the affected pensioners followed.

21. Thereafter in 1954, the 1951 restriction on dual benefits was repealed by Congress and made retroactive to wipe out completely the effects of the 1951 restriction.

22. The reasons for Congress' repeal of this restriction are as applicable today to the 1974 divestment as they were in 1954. These reasons as set forth in the legislative history of the 1954 Act are as follows:

> (a) Railroad employees believed that benefits once granted would not be reduced;
>
> (b) The dual benefits restriction was inequitable to those former railroad employees who were compelled to seek Social Security employment;
>
> (c) The dual benefits restriction created an inequity between railroad employees and persons covered by other federal retirement systems;
>
> (d) The dual benefits restriction created inequities between railroad employees and employees in other industries;
>
> (e) The dual benefits restriction created administrative difficulties for the Railroad Retirement Board; and
>
> (f) The dual benefits restriction discriminated against a special class of retired employees.

23. Prior to the enactment of the Railroad Retirement Act of 1974, the 1951 restriction or offset was the only previous attempt to actually eliminate a portion of an already existing Railroad Retirement benefit in the entire history of the Railroad Retirement system.

24. The two divestments are not, however, identical. The 1974 divestment works a more invidious discrimination in that it eliminates earned benefits as opposed to the elimination of unearned benefits involved in the 1951 divestment.

25. Unlike those injured by the 1951 Act, the plaintiff class not only had a statutory right to the full benefit (as did the 1951 class), but the plaintiff class also actually earned the benefit by making full employee contributions to the Railroad Retirement fund in compliance with the requirements of the Railroad Retirement Act of 1937. The 1951 class, on the other hand, had not earned, by contributions to the Railroad Retirement fund or Social Security funds, the credit given them for pre-1937 service.

26. The Financial Interchange mentioned in paragraphs 14-16 above, resulted in net payments to Railroad Retirement from Social Security, from 1937 to 1974 of 8.2 billion dollars. Despite this rather large transfer, it became apparent in the late sixties that the Railroad Retirement system was underfunded.

C. *The Commission on Railroad Retirement.*

27. In 1970, Congress by Pub. L. No. 91-377, 84 Stat. 791 (1971) established the Commission on Railroad Retirement to make a full study of the Railroad Retirement system and to recommend to Congress methods of making its pension fund actuarially sound.

28. Congress directed that the Commission be composed of five members with only one railroad management representative and one railroad union representative. The other three were to be representatives of the public. Of these five members, three were appointed by the President of the United States, one by the Speaker of the House, and one by the President Pro Tem of the Senate.

29. The Railroad Retirement Commission, after a thorough study of the system, submitted its written report to Congress on June 30, 1972.

30. One of the Commission's principal recommendations was that railroaders, in the future, no longer be permitted to earn and acquire full Social Security and full Railroad Retirement benefits without having their Social Security benefits offset against their Railroad Retirement benefits.

31. Another of the four principal recommendations of the Commision was that all those people with "vested" pension rights (including by definition all members of plaintiff Fritz' class) continue to have all their benefits, acquired under Railroad Retirement and Social Security prior to the date of changeover to a new Railroad Retirement system, completely preserved. This recommendation reads in pertinent part as follows:

> Recommendation 9-2: (a) The following principles with respect to vested rights should be followed in instituting changes to eliminate further accrual of rights to windfalls in dual OASDI benefits on the basis of future service:
>
> . . .

(3) Individuals who have vested rights to social security benefits by virtue of permanently or fully insured status, but cannot exercise them because they are not at retirement age under railroad retirement, should be guaranteed an equivalent right in dollar terms to the staff tier portion of their benefits, including vested dual benefits, as described in chapter 11. . . . COMMISSION Report, 368.

32. "Vested" was defined by the Commission precisely to include plaintiff Fritz' class. This definition reads as follows:

Legally Vested. As used in the text of this report, legally vested benefits refers to the status of currently or fully insured railroad workers under social security as of the transition or changeover date to a new two-tier railroad retirement system, with respect to their entitlement to a guaranty of their OASDI dual benefits accrued before the date of changeover.

. . .

Vested Benefit. A benefit the payment of which is not contingent upon a participant's continuation in specified employment;

Vesting. The attainment by a participant of a benefit right attributable to employer contributions, not contingent upon the participant's continuation in specified employment. In the RR system an employee is fully vested when he obtains 120 creditable service months. COMMISSION REPORT, 522 & 555.

D. *The Joint Management-Labor Negotiating Committee.*

33. Following receipt of the Commission's intensive and thorough report, Congress by specific legislation then directed railroad management and railroad labor to negotiate and prepare a bill to restructure the Railroad Retirement system in accordance with the specific recommendations of the Commission on Railroad Retirement. Pub. L. No. 93-69 § 107, 87 Stat. 162 (1973).

34. Unlike the Commission on Railroad Retirements, there were no representatives of the public either appointed to or present at the labor-management negotiations. Also, those people detrimentally affected by the later Railroad Retirement Act of 1974 (plaintiff Fritz' class of former railroaders) were not represented.

35. Unlike the Railroad Retirement Commission appointments, the 1974 Railroad Retirement Act management and labor negotiators were not appointed by either the President or Congress.

36. Instead, Congress allowed railway labor and railway management to make their own appointments of negotiators without review or consent of Congress. Pub. L. No. 93-69 § 107(a), 87 Stat. 162 (1973). These negotiators were termed the Joint Labor-Management Negotiating Committee (hereinafter referred to as the "JLMC").

37. To make the Railroad Retirement system actuarially sound, the JLMC had to alleviate the sys-

tem's funding deficit, which at the beginning of 1974 amounted to 9% of taxable payroll.

38. In the early negotiations of the JLMC meetings, and in accordance with the Commission's specific recommendations and the opening position of labor, railway management tentatively agreed that the plaintiff class' rights to their earned dual benefits under Railroad Retirement and Social Security were to be preserved.

39. The labor negotiators insisted, however, that the JLMC consider not only ways of removing the actuarial deficit but also ways of increasing pension benefits. These additional and contra-purpose considerations were not recommended by the Commission on Railroad Retirement.

40. The labor negotiators however demanded and they later received agreement from the railway management negotiators, as to the following additional money benefits by and through the Railroad Retirement Act of 1974 which benefits increased, rather than decreased, the actuarial deficit of the pension fund:

(a) Full supplemental annuity[1] benefits at age 60 to those retiring with 30 years service;

(b) Full spousal benefits at age 60 for spouses of employees with 30 years service; and

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[1] Supplemental annuities are added to regular annuities for railroaders who have worked for the railroad industry at least 25 years, and who were actively employed by the railroad industry upon retirement (i.e. union members). 45 U.S.C. § 231a(b)(19).

(c) Increase in benefits guaranteed for widows and other survivors from 110% of comparable Social Security benefits to 130%.

41. Until October 1973, railroad employees, including the plaintiffs class, contributed a percentage of their salary to Railroad Retirement far in excess of that being contributed by non-railroad workers to Social Security.

42. After October 1973, however, the percentage contribution of railroad workers was reduced and made equal to that of workers covered by Social Security. Thus, when Congress passed the Railroad Retirement Act of 1974 those persons then working the railroads were contributing a far smaller percentage of their salary to Railroad Retirement than had previous railroad employees.

43. Through an initially agreed upon restructuring of the benefit formula, which restructuring completely preserved the plaintiffs class' vested benefits, and through the planned receipt of the funds requested from Social Security (later from the General fund) the JLMC was able to calculate the removal of the original 9% deficiency in the Railroad Retirement Fund.

44. The increase in benefits demanded by the unions still, however, left the fund with an approximate 3% deficit. The cost of the new benefits was offset by the savings to the fund realized by directly violating one of the four principal, specific recommendations of the Commission on Railroad Retirement and eliminating Fritz' class from the protection afforded those

with "vested" earned dual benefits. Essentially, the railroad labor negotiators traded off the plaintiff class of beneficiaries to achieve added benefits for their current employees, even though doing so violated the basic Congressional purposes of the negotiations. Furthermore, by sacrificing the plaintiff class, the railroad labor unions breached the duty of fair representation they owed to the plaintiff class, which duty resulted from the labor unions' purported representation of the plaintiff class' interests in the JLMC negotiations.

45. At no time prior to passage of the 1974 Act was plaintiff Fritz' class notified that its earned dual benefits were going to be eliminated. Indeed, the news or other information that was published and available at the time the JLMC was violating the Railroad Retirement Commission's recommendation and negotiating out plaintiffs Fritz' class indicated that all those persons who presently had rights to earned dual benefits were being fully protected.

46. There is no evidence to indicate that the Railroad Retirement Board or its field offices informed any member of the class about the potential reduction in earned benefits during the time that Congress was working on the 1974 Act.

47. Despite the aforementioned assurances of protection, the JLMC agreed in executive conference in March 1974, to eliminate the plaintiff class in exchange for the increased benefits to others then sought by the railroad labor negotiators which increased benefits are identified in paragraph 40 above.

48. The plaintiff class was removed from the class of those persons with between 10 and 25 years service and Social Security vesting who would continue their entitlement to the dual earned benefit through the JLMC's change in the definition of "vested." Although "vested" had always included all persons, including the plaintiff class, who had made the required contributions and who had met all the service requirements (COMMISSION REPORT, 552 & 555), the JLMC, to eliminate plaintiffs Fritz' class, added a new requirement that a person had to also have a "current connection" with the railroad industry or have worked in the railroad industry sometime during calendar year 1974. This new requirement bore no significance to nor any connection with the actual earning of the dual benefits.

49. By adding this new and completely arbitrary distinction the JLMC deprived the plaintiff class of their earned dual benefits while at the same time preserving them for persons possessing all the same traits as the plaintiff class (more than 10 but less than 25 years railroad service, Social Security vesting, and not yet retired) but who were also currently connected to the industry or had worked in the industry at any time in 1974. Essentially, these current employees were active union members whose elected representatives were directly involved in the negotiations as members of the JLMC.

50. After eliminating plaintiff Fritz' class and providing for increased benefits in the manner aforesaid, the JLMC on April 10, 1974, presented their

joint written proposal for a bill to save the railroad pension fund to the Congressional sponsors, Senator Williams and Congressman Staggers.

E. *Congressional Consideration.*

51. During Congressional consideration of the bill, no representative of the plaintiff class was invited to participate in the Congressional hearings nor were any of the class members notified of the impending loss of benefits.

52. In the Congressional hearings on the JLMC's draft bill, members of the JLMC were less than candid when questioned on the adverse effects their bill would have upon plaintiff's class and, indeed, led Congress to believe that the plaintiff class was protected by the Railroad Retirement Act of 1974.

> Mr. Dingell. [Congressman, D. Mich.] Who is going to be adversely affected? Somebody has to get it in the neck on this. Who is going to be that lucky fellow?
>
> Mr. Dempsey. [William Dempsey, Chairman, National Railroad Labor Conference and Chief Management Negotiator of the bill] Well, I don't think so really. I think this is the situation in which everybody wins. Let me explain.
>
> * * * * *
>
> Mr. Dingell. Mr. Dempsey, I see some sleight of hand here but I don't see how it is happening. I applaud it but I would like to understand it. My problem is that you are going to go to a realistic system that is going to cost less but pay more benefits. Now if you have accomplished this, I

suggest we should put you in charge of the social security system.

Mr. Dempsey. Let me go back once again. I recognize that this is very complicated. It took me a long time to understand why a new benefit formula that would produce at least in the near future slightly higher benefits than the old one, could possibly save the fund a significant amount of money.

Now let me try it again. (Restructuring of the Railroad Retirement System) HEARINGS ON H.R. 15301 BEFORE THE HOUSE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE, 93d Cong., 2d Sess. 199, 201 (1974).

Mr. Dempsey. . . . This part on the top is the cost of the gradual phaseout of dual benefits, that is, the protection to be accorded to people who are on the rolls now receiving dual benefits and those who are vested under both systems as of January 1, 1975, the idea of the Commission being, and we agree with this, that these individuals had a right to rely upon the law as it existed when they were working. They have made their contributions. They have relied upon the law. They . . . should be protected. So this is the cost of that social production for this group of dual beneficiaries, and the question, the fundamental question it seems to us is, is that a Federal responsibility or is that cost to be fastened on the railroad industry? Restructuring of the Railroad Retirement System, HEARINGS ON H.R. 15301 BEFORE THE HOUSE ON INTERSTATE AND FOREIGN COMMERCE, 93d Cong., 2d Sess., 213-14 (1974).

* * * * *

Senator Hathaway. We could cut down the amount of the contribution, changing the cutoff. We could say 11 years instead of 10, as far as vesting is concerned.

Mr. Dempsey. Yes.

Senator Hathaway. Or in age in number of years.

Mr. Dempsey. Yes; you can do it both ways. I think the problem here is to find a standard that people in general will regard as fair. You will always have someone who is a little short of the line, and he will always feel that they did something different. Once you depart from what the law prescribes in terms of the qualifying years, of course, then you do have trouble. You can always say that as long as you stick to 10 years for railroad retirement, or however many years for social security, then say to that man, well, we are sorry, but this is really what the law did provide, and if we went any place other than what the law requires, then we would have an argument on where do we stop, or how far should we go. It seems to me the most logical approach that people will determine is fair is to stick to the vesting requirements of the two respective systems.

Senator Hathaway. Thank you very much, Mr. Dempsey. We have no further questions. Senate Hearings at p. 334.

53. The only hint of the plaintiff class' loss that the JLMC gave to Congress was contained in concededly inaccurate reports prepared by the management and labor sponsors which written reports were

inserted into the record and thereafter refuted by the oral testimony of the negotiators as aforementioned:

> Third, employees who have sufficient service and copensation [sic] to be fully qualified under both systems but who have not retired, prior to January 1, 1975, would be divided into two classes or groups. That division constitutes a refinement upon the recommendations of the Commission on Railroad Retirement which the Joint Negotiating Committee believed to be desirable in order to reflect more accurately the comparative equities of the two groups.
>
> The first group would be comprised of those employees with a "current connection" with the railroad industry—12 months of railroad service out of the previous 30 months, as defined in the 1937 Act and in the bill—either as of December 31, 1974 or as of the date of retirement, and also of those employees with 25 years or more of railroad service even though without such a "current connection." The Joint Negotiating Committee concluded that the service with and attachment to the railroad industry of such employees are sufficient to afford them an equity in windfall dual benefits substantially equivalent to the equity of existing beneficiaries. . . .
>
> The second group would be comprised of employees, who, after qualifying for benefits under the Railroad Retirement Act, left the railroad industry without having 25 years railroad service and who do not now have a current connection to the railroad industry. Such employees, the Joint Negotiating Committee believed, have a lesser equitable claim than those who have remained with the railroad industry. Accordingly,

> under the bill they would not receive a windfall dual benefit, upon retirement, unless they also had fully qualified under Social Security by the close of the year in which they left railroad service (although they would be entitled to the lump-sum benefit refunding excess employment taxes paid [upon death]). . . . HEARINGS BEFORE THE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE ON H.R. 15301, 93d Cong., 2d Sess., at 168 (1974).

The above quotation euphemistically refers to the discrimination against the plaintiff class as a "refinement." Furthermore, the above quotation inaccurately defines the persons whose vested benefits were protected since it fails to disclose that persons who worked for the railroads for even one day in calendar year 1974 also received their full benefits.

54. The language in paragraph 53 above, shows that the plaintiff class and all other persons who had more than 10 and less than 25 years railroad service as of December 31, 1974, and who had sufficient service also to vest under Social Security as of December 31, 1974, and who had not yet retired as of December 31, 1974, were considered to be of one classification, thereafter divided into two groups solely for purposes of eliminating plaintiff Fritz' class from its earned benefits. This language also fails to show any justification for the discrimination.

55. All persons who, as of December 31, 1974, had 10 but less than 25 years railroad service, had sufficient service to vest under Social Security, and who were not yet retired, were one distinct class of persons

prior to the passage of the 1974 Act for retirement purposes.

56. The defendant in its briefs has argued that the plaintiff class was eliminated from their "vested" dual benefits because they are not "career" railroaders. Congress, however, considered a career railroader to be a person who spent his working life in the railroad industry i.e., one who spent 25 years in such industry. Congress did not distinguish between the plaintiff class and those persons similarly situated (10-25 years service) who continued to receive their dual benefit by reference to any so-called career test. Moreover, the Commission on Railroad Retirement referred to earlier herein made no such distinction either.

57. The "career" test advanced by the Railroad Retirement Board for the discrimination against the plaintiff class could not have been, and was not, the rationale behind the discrimination since: (a) the "career test" was never mentioned in Congress' review of the 1974 Railroad Retirement Act nor by any of the Acts' supporting private interest groups, instead, appearing for the first time in the Railroad Retirement Board briefs as an apparent post-hoc rationalization; (b) the authority cited by the Railroad Retirement Board referred to 1966 legislation dealing with supplemental annuities, not basic retirement benefits; (c) the "career test" discussed in 1966 is a wholly different concept and a different definition from that now advanced by the Railroad Retirement Board; (d) the Congressional history of the Railroad

Retirement Act of 1974 shows that, for the purposes of that Act, Congress considered a "career" railroader to be one who spent his entire working career with the railroad industry, not simply one who spent 10 years with fortuitous service in 1974; (e) the "career test" had never before been used to cause an exclusion of prior "vested" benefits, it had always been, rather, a benefit expanding concept; (f) the Commission on Railroad Retirement made no such distinction nor recommendation; and (g) the utilization of such a new "vesting" trait directly violated one of the Commission's principal specific recommendations.

58. The distinction between the plaintiff class and those persons similarly situated to the plaintiff class, who nevertheless are entitled to receive the dual earned benefit, is the "current connection" or "employment in 1974 qualification" mentioned above.

59. The current connection or employment in 1974 trait is not a proper standard for determining whether a railroader is a career employee. Being "currently employed" or being employed on any particular date in 1974 does not transform a former or present railroader into one whose life progression revolves around the railroad industry. Such criteria is especially incorrect and insidious for divesting persons of already earned dual benefits. Moreover, such criteria, prior to the 1974 Act, had never been employed as a trait for dual benefit vesting or for earning the basic Railroad Retirement annuity.

60. Indeed, as various affidavits demonstrate, there are members of the plaintiff class who have served a

greater number of years as an employee in the railroad industry than those persons similarly situated to the plaintiff class but who are entitled to receive their full dual earned benefits by virtue of the 1974 Act. Affidavits submitted in connection with the plaintiff's motion for summary judgment demonstrate that some members of the class had served as many as 14 more years in the railroad industry than those entitled to receive full dual benefits. In other words, some members of the class have served more than twice the time in the railroad industry than one receiving his or her full dual benefits under the 1974 Act. Thus many members of plaintiff's class are more "career" oriented for railroad purposes than are persons who are actually receiving full dual benefits under the Act.

61. After the legislative hearings, the Railroad Retirement Act of 1974 was passed on September 30, 1974, without change from the draft bill insofar as it affected plaintiff's class.

62. At no point in Congress' review of the Railroad Retirement Act of 1974 did railroad management or labor inform Congress that their bill violated one of the Commission on Railroad Retirement's principal recommendations by denying to the plaintiff class their already "vested" benefits.

63. At no time during the hearings did Congress even give a hint that it understood that the bill by its language eliminated an earned benefit of plaintiff's class. Contrariwise, one of the major announced purposes of both the United States Senate and the United States House of Representatives in passing the Rail-

road Retirement Act of 1974 was to protect the persons in plaintiff's class:

> Principal Purpose of The Bill
>
> The Bill provides for a complete restructuring of the Railroad Retirement Act of 1937, and will place it on a sound financial basis. . . .
>
> Persons in receipt of both Railroad Retirement and Social Security benefits as of December 31, 1974 will continue to receive benefits under both systems without any reduction in those benefits. Persons who already have vested rights under both the Railroad Retirement and the Social Security systems will in the future be permitted to receive benefits computed under both systems just as is true under existing law. S. Rep. No. 93-1163, 93d Cong., 2d Sess. *reprinted in* [1974] U.S. Code Cong. & Ad. News 5702. *Accord* H.R. Rep. No. 93-1345, 93d Cong., 2d Sess. (1974).

64. Congress considered all recipients of dual earned benefits equal, and intended to protect the "vested" benefits of all dual earned beneficiaries equally. To thwart any criticism of this approach and to make its position in this regard patently obvious, Congress concluded the following about all dual earned beneficiaries.

> Dual beneficiaries cannot fairly be criticized, since they have merely secured the benefits to which they are entitled under existing law. That is why their equities should be preserved. H.R. Rep. No. 93-1345, 93d Cong., 2d Sess. 11 (1974).

65. Congress intended only to prevent future vesting under both Railroad Retirement and Social Security, not to deprive any person of then-vested rights. Congress recognized only those not dually vested, as of December 31, 1974, as the only class of persons to be adversely affected by the 1974 Act.

> It must be recognized that the bill actually takes benefits away from certain railroad employees—those who have not already qualified for Social Security benefits. H.R. Rep. 93-1345, 93d Cong., 2d Sess. 6 (1974).

66. Since the passage of the Railroad Retirement Act of 1974, the railroad industry has made statements attempting justification for the distinction made between the plaintiff class and the other similarly situated and "vested" railroaders for purposes of receipt of full dual benefits. None of the statements provide a rational or justified basis for the distinction.

67. Moreover, no other evidence discloses any rational or justified distinction therefor. Nor does the evidence make any reference whatsoever to the so-called "career" railroader distinction argued by the defendant in its briefs in this cause of action.

F. *Injury To The Plaintiff Class.*

68. Plaintiff Fritz and the members of his certified class are fixed-income elderly people whose productive, income-earning years are now behind them. These fixed-income retirees cannot now relive their earnings years in order to reacquire their previously earned but now lost dual benefits.

69. The defendant estimates that the entire group of persons injured by the 1974 Act's classification discussed above, including the plaintiff's class, lost approximately $88 per month per person as a result of that classification. While the 1974 Act has not totally eliminated the class' Railroad Retirement benefits, the evidence discloses it has essentially done so to a number of the class members, substantially reducing such benefits, for example, from $110 to $7.24.

70. The class' reliance on the earned railroad retirement benefit and on the anticipated receipt of full dual benefits is clear from the evidence adduced herein. The affidavits of class members especially, show that not only had its members expected full benefits but also that the Board's field offices around the country had on various earlier dates informed class members both orally and in writing of the full amounts of Railroad Retirement benefits undiminished by any set-off or restriction that these members should anticipate receiving when the date of their actual retirement would occur.

71. Equally clear from the evidence is the fact that the class' reliance has been to the class' detriment. Class members have been forced to alter substantially their mode of retirement living due to the drastic reduction of Railroad Retirement benefits worked by the 1974 Act. This point was confirmed in the JLMC negotiations shortly prior to the sending of its report to Congress in April, 1974:

> Mr. Dempsey: . . . The benefit [dual benefit] is one that if we were starting out we would

> not have at all. So theoretically we would urge that it be out completely as of January 1, 1975. But we cannot do that—we have people who are relying on benefits, not responsible for them but merely working for them under the rules as they stood. *Burner Deposition Exhibit I* (March 18, 1974, JLMC Meeting) (bracketed material added).

72. The evidence further shows that the class is comprised of former railroaders who were not "currently connected" with the railroad industry nor employed therein in 1974. The evidence shows that many, however, left the railroad industry because they were forced to do so, not because they were seeking other employment after earning their Railroad Retirement benefit. Thus many members of the class were involuntarily deprived of the opportunity to either a "current connection" or 1974 employment. This fact further contributes to the impropriety of eliminating railroaders of their earned dual benefits on the basis of such criteria. 123 Cong. Rec. S. 1448 (daily ed., Jan. 26, 1977).

II. CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact the plaintiff is entitled to judgment as a matter of law and the Court makes the following Conclusions of Law:

1. This Court has jurisdiction of this cause of action under 28 U.S.C. §§ 1331(a) and 1337, and has heretofore properly certified this cause of action as a class action in accordance with the requirements of

law and the Federal Rules of Civil Procedure. Plaintiff Gerhard H. Fritz is the duly certified plaintiff representative of the class.

2. Section 3(h) of the Railroad Retirement Act of 1974, 45 U.S.C. § 231b(h), creates a classification as to persons covered by the Railroad Retirement system between (a) those persons who have less than 25 but more than 10 years railroad service as of December 31, 1974, who were "vested" under Social Security and Railroad Retirement as of September 31, 1974, and who had a "current connection" as defined in 45 U.S.C. § 231(o) with the railroad industry as of December 31, 1974, or who had worked for the railroad industry in 1974 ("Other Vested Railroaders"); and (b) those persons who have less than 25 but more than 10 years of railroad service as of December 31, 1974, who were "vested" under Social Security and Railroad Retirement as of December 31, 1974, but who had no current connection as defined in 45 U.S.C. § 231(o) or who did not work for the railroad industry in 1974 ("Plaintiff Class").

3. The plaintiff class consists of those persons described in Conclusion 2(b) above who were retired as of January 31, 1977.

4. The distinction between the Plaintiff Class and all Other Vested Railroaders is based solely upon whether the railroad retirement beneficiary was "active" with the railroads as of December 31, 1974, either by having a current connection as of that date with the railroad industry or having been employed in the railroad industry at any time in calendar year

1974. In all other respects the two classes are indistinguishable.

5. The Plaintiff Class' claim does not involve the deprivation of a fundamental right or the discrimination against a suspect class. The discrimination against the Plaintiff Class must therefore be arbitrary, capricious and irrational before such discrimination can be held unconstitutional (the "rational basis test").

6. Arbitrary, capricious and irrational discrimination against a class of persons is prohibited by the equal protection component to the due process clause of the Fifth Amendment to the United States Constitution.

7. While the standard of review in this case is the rational basis test, that standard is not meaningless and requires that the discrimination at issue have some rational relationship to the purposes of the statute which created it.

8. The rationality of a statutory classification is tested against the actual purpose of the statute and not against a purpose created by the defendant after-the-fact.

9. The purposes of the Railroad Retirement Act of 1974 were to place the Railroad Retirement Fund on a sound actuarial basis and to protect completely the rights of those persons entitled before December 31, 1974, to receive their full benefits under both Social Security and Railroad Retirement earned and "vested" under the previous law.

10. Congress did not create the classification between the Plaintiff Class and all Other Vested Railroaders for the purpose now suggested by the defendant of favoring "career" railroad employees over other railroad employees.

11. Assuming that Railroad Retirement benefits are as the Supreme Court has held, non-contractual, those benefits, if retained, must be distributed and made available to the beneficiaries in a non-discriminatory manner.

12. The savings provided the Railroad Retirement Fund by imposing a reduction of benefits solely upon the Plaintiff Class is not sufficient, of itself, to justify an otherwise arbitrary, capricious and irrational classification.

13. The actuarial deficiency of the Railroad Retirement Fund cannot be resolved, in conformity with the rational basis requirement of the Fifth Amendment, by merely excluding inactive railroaders from their entitlement to full railroad retirement benefits, especially when such railroaders over the course of their railroad years, contributed to and earned their entitlement to the benefits in strict accordance with the law then in effect.

14. Other methods of resolving the financial difficulties of the Railroad Retirement Fund were available which did not impose upon any single class the complete burden of rendering the Railroad Retirement Fund actuarially sound.

15. The reasonable reliance of the Plaintiff Class and their expectations to a full Railroad Retirement

benefit after a minimum of 10 years credited Railroad Retirement service, heightens the arbitrariness, capriciousness and irrationality of the Railroad Retirement Act of 1974's divestment of the Plaintiff Class' entitlement to a full Railroad Retirement benefit.

16. The arbitrariness, capriciousness and irrationality of the Act is also heightened by the railroad labor union's agreement during the critical negotiations to deprive the plaintiff class of their "vested benefits" in exchange for liberalized benefits for others thus breaching the railroad labor union's duty of fair representation owed plaintiff's class which breach was sanctioned by Congress in its enactment of the 1974 Railroad Retirement Act.

17. Congress' unawareness of the adverse effects a statute imposes on a class, and any conclusion of Congress as expressed in legislative history, that a statute harms no one when, in fact, a class is harmed, are also factors bearing adversely on the rationality of a statutory discrimination between similarly situated persons.

18. Congress was unaware that the Railroad Retirement Act of 1974 adversely affected the Plaintiff Class, and, indeed, Congress' purpose was to protect fully the Plaintiff Class' full retirement benefits.

19. The classification created by the Railroad Retirement Act of 1974 as defined in Conclusion 2 above is not rationally related to either the purpose of making the Railroad Retirement Fund actuarially sound or the purpose of protecting completely those persons who were entitled to receive both Social Security and Railroad Retirement Act benefits under previous law.

20. The classification as defined in Conclusion 2 above is unconstitutional under the equal protection component of the due process clause of the Fifth Amendment of the United States Constitution. Such classification is arbitrary, capricious and irrational and denies Plaintiff Class equal protection under the law.

21. Because the Supreme Court of the United States has previously ruled on the question, this Court holds that the Plaintiff Class' Railroad Retirement benefits are not vested property rights under the Fifth Amendment to the United States Constitution.

22. All persons injured by the classification described in Conclusion 2(b) above, are entitled to have those retirement benefits they would have received had they qualified for the "windfall" component of 45 U.S.C. § 231b(h) in the same manner and to the same extent as if they were Other Vested Railroaders as same are described in Conclusion 2(a) above.

23. All persons injured by the classification described in Conclusion 2 above are entitled to have the windfall component as of and from the date of their retirement.

24. Finally, the Court notes that the general class of former railroaders injured by the Railroad Retirement Act of 1974 identified in the Amended Complaint is as yet uncertified as to class status. The present Amended Complaint alleges plaintiffs L. Jackson Lipp and William D. Gibson as representative plaintiffs of this general class. The distinction be-

tween the certified class and the general class viz., the larger group of potential class members identified in the Amended Complaint, is based solely upon whether a general class member retired on or before January 31, 1977, and thus was sustaining an actual injury as of the date of class certification. In all other relevant respects, the certified class and the general class appear the same.

25. The findings and conclusions set forth above are deemed to thus apply equally to the yet uncertified general class members who retired on or after February 1, 1977. The Court is hopeful that the parties can agree as to the appropriate disposition of the general class' claims without requiring further certification proceedings or the substantial time of this Court.

To the extent any finding of fact shall have been denominated a conclusion of law hereinabove, it shall be deemed a finding of fact; to the extent any conclusion of law shall have been denominated a finding of fact hereinabove, it shall be deemed a conclusion of law.

/s/ Cale J. Holder
HONORABLE CALE J. HOLDER,
Judge,
United States District Court,
Southern District of Indiana

Dated: 27 July 1979

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

Cause No. IP 76-419-C

GERHARD H. FRITZ, On Behalf of Himself and All Others Similarly Situated, PLAINTIFF

v.

UNITED STATES RAILROAD RETIREMENT BOARD (An Agency of the United States of America), DEFENDANT

JUDGMENT

The Court having made its Findings of Fact and Conclusions of Law herein and there being no genuine issue as to any material fact and plaintiff being entitled to judgment as a matter of law under the provisions of the Federal Rules of Civil Procedure, Rule 56(e), upon the issues of the Cross-Motions for Summary Judgment, it is hereby ORDERED, ADJUDGED AND DECREED that:

(a) Plaintiff Gerhard H. Fritz' Motion for Summary Judgment filed on behalf of himself and all other members of his certified class, is GRANTED, and defendant United States Railroad Retirement Board's Motion for Summary Judgment is DENIED;

(b) The defendant shall henceforth compute and pay benefits for said plaintiff and all mem-

bers of his certified class who were entitled, as of December 31, 1974, to receive Social Security benefits upon retirement, and who had more than ten but less than twenty-five years credited railroad service, and who were not yet retired, as of December 31, 1974, as though those persons had a current connection with the railroad industry, as defined in 45 U.S.C. § 231(o), on December 31, 1974, or served as an employee to a railroad employer or an employee representative during calendar year 1974;

(c) The defendant shall pay to said plaintiff and all members of his class who were entitled to receive, as of December 31, 1974, Social Security benefits upon retirement, and who had more than ten but less than twenty-five years of credited railroad service, and who were not yet retired as of December 31, 1974, but who had retired since December 31, 1974, those retirement benefits such persons would have received had they had a current connection with the railroad industry as of December 31, 1974, or served as an employee to a railroad employer or as an employee representative during calendar year 1974;

(d) The defendant shall provide this Court and counsel for the said plaintiff, within sixty days from the date of entry of this Judgment, with a plan for the payment of this Judgment to the persons benefited, including in such plan a calculation of the amount to be paid and an appropriate schedule for the making of such payments;

(e) Also within the time period set forth in (d) above, the Court will entertain receipt of a

plan from the defendant for the payment of benefits to the yet uncertified members of the general class upon the same basis as found and concluded in relation to the certified class. If such plan is not then forthcoming, the plaintiffs are instructed to thereafter proceed with proceedings in this cause of action so as to certify and litigate to an appropriate conclusion, the claims of the members of the alleged general class;

(f) The costs of this action are assessed against the defendants; and

(g) The plaintiff's counsel shall have its reasonable attorneys' fees and expenses paid out of the fund thereby created for the persons benefited. The amount of such fees and expenses will be determined by this Court upon appropriate petition and hearing therefor.

/s/ Cale J. Holder
HONORABLE CALE J. HOLDER, Judge,
United States District Court,
Southern District of Indiana

DATE: 27 July 1979

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

Cause No. IP 76-419-C

GERHARD H. FRITZ, On Behalf of Himself and All Others Similarly Situated, PLAINTIFF

v.

UNITED STATES RAILROAD RETIREMENT BOARD (An Agency of the United States of America), DEFENDANT

NOTICE OF APPEAL

Notice is hereby given that the defendant hereby appeals to the Supreme Court of the United States, pursuant to Title 28, United States Code, Section 1252, from the judgment of the District Court entered in this action on July 27, 1979.

Dated at Indianapolis, Indiana, this 22nd day of August, 1979.

JAMES L. COWEN
Chairman, United States Railroad Retirement Board (an agency of the United States of America) Defendant

/s/ Virginia Dill McCarty
VIRGINIA DILL MCCARTY
United States Attorney

By: /s/ Charles Goodloe, Jr.
CHARLES GOODLOE, JR.
Assistant United States Attorney

274 United States Courthouse
46 East Ohio Street
Indianapolis, Indiana 46204

APPENDIX D

Section 3(h) of the Railroad Retirement Act of 1974, 45 U.S.C. 231b(h), provides, in pertinent part:

> (1) The amount of the annuity provided under subsections (a) through (d) of this section of an individual who (A) will have (i) rendered service as an employee to an employer, or as an employee representative, during the calendar year 1974, or (ii) had a current connection with the railroad industry on December 31, 1974, or at the time his annuity under section 2(a)(1) of this Act began to accrue, or (iii) completed twenty-five years of service prior to January 1, 1975, and (B) will have (i) completed ten years of service prior to January 1, 1975, and (ii) been permanently insured under the Social Security Act on December 31, 1974, shall be increased by an amount equal to the amount by which (C) the sum of (i) the primary insurance amount to which such individual would have been entitled, upon the attainment of age 65 (or, if later, for January 1975), under the provisions of the Social Security Act as in effect on December 31, 1974, if his service as an employee after December 31, 1936, and prior to January 1, 1975, were included in the term "employment" as defined in that Act and if he had no wages or self-employment income under that Act other than wages derived from such service as an employee, and (ii) the primary insurance amount to which such individual would have been entitled, upon the attainment of age 65 (or, if later, for January 1975), under the

provisions of the Social Security Act as in effect on December 31, 1974, on the basis of his wages and self-employment income derived from employment and self-employment under that Act prior to January 1, 1975, exceeds (D) the primary insurance amount to which such individual would have been entitled, upon the attainment of age 65 (or, if later, for January 1975), under the provisions of the Social Security Act as in effect on December 31, 1974, on the basis of his wages and self-employment income derived from employment and self-employment under that Act prior to January 1, 1975, and on the basis of compensation derived from service as an employee after December 31, 1936, and prior to January 1, 1975, if such service as an employee had been included in the term "employment" as defined in that Act.

(2) The amount of the annuity provided under subsections (a) through (d) of this section to an individual who (A) will not have met the conditions set forth in subclause (i), (ii), or (iii) of clause (A) of subdivision (1) of this subsection, but (B) will have (i) completed ten years of service prior to January 1, 1975, and (ii) been permanently insured under the Social Security Act as of December 31 of the calendar year prior to 1975 in which he last rendered service as an employee to an employer, or as an employee representative, shall be increased by an amount equal to the amount by which (C) the sum of (i) the primary insurance amount to which such individual would have been entitled, upon the attainment of age 65 (or, if later, for January 1975), under the provisions

of the Social Security Act as in effect on December 31, 1974, if his service as an employee after December 31, 1936, and prior to January 1, 1975, were included in the term "employment" as defined in that Act and if he had no wages or self-employment income under that Act other than wages derived from such service as an employee, and (ii) the primary insurance amount to which such individual would have been entitled, upon the attainment of age 65 (or, if later, for January 1975), under the provisions of the Social Security Act as in effect on December 31, 1974, on the basis of his wages and self-employment income derived from employment and self-employment under that Act as of December 31 of the calendar year prior to 1975 in which he last performed service as an employee under this Act, exceeds (D) the primary insurance amount to which such individual would have been entitled, upon the attainment of age 65 (or, if later, for January 1975), under the provisions of the Social Security Act as in effect on December 31, 1974, on the basis of his wages and self-employment income derived from employment and self-employment under that Act as of December 31 of the calendar year prior to 1975 in which he last performed service as an employee under this Act and on the basis of compensation derived from service as an employee after December 31, 1936, and prior to January 1, 1975, if such service as an employee had been included in the term "employment" as defined in that Act.

(3) The amount of the annuity provided under subsections (a) through (d) of this sec-

tion of an individual who (A) will have (i) rendered service as an employee to an employer, or as an employee representative, during the calendar year 1974, or (ii) had a current connection with the railroad industry on December 31, 1974, or at the time his annuity under section 2(a)(1) of this Act began to accrue, or (iii) completed twenty-five years of service prior to January 1, 1975, and (B) will have completed ten years of service prior to January 1, 1975, and is the wife, husband, widow, or widower of a person who will have been permanently insured under the Social Security Act on December 31, 1974, shall be increased by an amount equal to the smaller of (C) the wife's, husband's, widow's, or widower's insurance benefit to which such individual would have been entitled, upon attaining age 65 (or, if later, for January 1975), under the provisions of the Social Security Act as in effect on December 31, 1974, on the basis of such person's wages and self-employment income derived from employment and self-employment under that Act prior to January 1, 1975, or (D) the primary insurance amount to which such individual would have been entitled upon attaining age 65 (or, if later, for January 1975), under the provisions of the Social Security Act as in effect on December 31, 1974, on the basis of such individual's wages and self-employment income derived from employment and self-employment under that Act prior to January 1, 1975, and on the basis of compensation derived from service as an employee after December 31, 1936, and prior to January 1, 1975, if such

service as an employee had been included in the term "employment" as defined in that Act.

(4) The amount of the annuity provided under subsections (a) through (d) of this section of an individual who (A) will not have met the conditions set forth in subclause (i), (ii), or (iii) of clause (A) of subdivision (3) of this subsection, but (B) will have completed ten years of service prior to January 1, 1975, and is the wife, husband, widow, or widower of a person who will have been permanently insured under the Social Security Act as of December 31 of the calendar year prior to 1975 in which such individual last rendered service as an employee to an employer, or as an employee representative, shall be increased by an amount equal to the smaller of (C) the wife's, husband's, widow's, or widower's insurance benefit to which such individual would have been entitled, upon attaining age 65 (or, if later, for January 1975), under the provisions of the Social Security Act as in effect on December 31, 1974, on the basis of such person's wages and self-employment income derived from employment and self-employment under that Act as of December 31 of the calendar year prior to 1975 in which such individual last performed service as an employee under this Act of (D) the primary insurance amount to which such individual would have been entitled upon attaining age 65 (or, if later, for January 1975), under the provisions of the Social Security Act as in effect on December 31, 1974, on the basis of such individual's wages and self-employment income derived from em-

ployment and self-employment under that Act as of December 31 of the calendar year prior to 1975 in which such individual last performed service as an employee under this Act and on the basis of compensation derived from service as an employee after December 31, 1936, and prior to January 1, 1975, if such service as an employee had been included in the term "employment" as defined in that Act.

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